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NO. COA06-708

NORTH CAROLINA COURT OF APPEALS

Filed: 3 April 2007

IN RE

A.S.W.

Johnston County

No. 05 J 176

Appeal by Respondent-mother from order entered 9 January 2006, *nunc pro tunc* 14 December 2005, by Judge Resson O. Faircloth, II, in District Court, Johnston County. Heard in the Court of Appeals 12 December 2006.

Leon A. Lucas, P.A., by Leon A. Lucas, for petitioner-appellee.

Duncan B. McCormick, for respondent-appellant.

WYNN, Judge.

Under N.C. Gen. Stat. § 7B-1111(a)(4) (2005), parental rights may be terminated for the willful failure without justification to pay for the care, support, or education of a child for a period of one year, in violation of a judicial decree. Here, Respondent-mother argues this statute does not apply to the reimbursement of uninsured medical or extracurricular expenses, but instead only to necessary costs related to the child's "care, support, or education." Because a judicial decree required Respondent-mother to pay the reimbursements, we affirm the order of termination.

On 14 September 2005, Petitioner-father filed a petition

asking the trial court to terminate the parental rights of his ex-wife, Respondent-mother, as to the minor child A.S.W. at issue in this case. Petitioner-father and Respondent-mother were previously married, then separated in 1995 and divorced in 1996. From that point until 2002, Petitioner-father and Respondent-mother shared custody of the minor child, who resided for a week at a time with Petitioner-father and then a week with Respondent-mother for that seven-year period. Respondent-mother developed an addiction to cocaine at some point in 2001 or 2002. On 10 December 2002, a judicial order was entered granting temporary physical custody of the minor child to Petitioner-father, with provisions for weekend and holiday visitation for Respondent-mother. Petitioner-father waived his claim for child support, but Respondent-mother was ordered to reimburse him for one-half of costs incurred for uninsured medical and extracurricular expenses for the minor child, within thirty days of Petitioner-father's submission of a bill. Respondent-mother was then incarcerated on 30 December 2002 for convictions related to forging payroll checks and taking \$30,000 from her employer.

Respondent-mother was released from prison on 30 July 2004; during the nineteen months she was incarcerated, she saw the minor child one time, with their contact otherwise limited to written correspondence and a few phone calls. Immediately prior to her release, Petitioner-father filed a motion for modification of custody and temporary suspension of visitation, seeking to have Respondent-mother's visitation suspended. A consent order entered

on 21 September 2004 awarded primary permanent custody to Petitioner-father, with supervised visitation for Respondent-mother. The order continued the same financial arrangements as the prior order, namely, Petitioner-father waiving child support and Respondent-mother ordered to pay one-half of all uninsured medical and extracurricular expenses for the child.

After her release from prison, Respondent-mother had one supervised visitation with the minor child at Petitioner-father's home. She also talked on the telephone with the minor child on occasion. According to Petitioner-father and his wife, Respondent-mother had no contact with the minor child from February 2005 until August 2005. Respondent-mother also failed to reimburse Petitioner-father for extracurricular and medical expenses incurred for the minor child in 2003 and 2004, despite being given receipts. Petitioner-father and his wife did not send any receipts for 2005, when they had failed to get any payment from Respondent-mother for the earlier receipts.

On 11 August 2005, Respondent-mother was sent back to prison for violating her probation by moving out of Johnston County without permission and by failing to complete her community service requirement. According to testimony from Petitioner-father's wife and from Respondent-mother, the minor child and Respondent-mother exchanged letters in August 2005. Petitioner-father filed a petition to terminate Respondent-mother's parental rights on 14 September 2005, alleging that Respondent-mother had willfully neglected the minor child, had failed to provide proper care,

supervision, discipline, medical care, and financial support for the minor child, and had abandoned the minor child. On 9 January 2006, the trial judge entered a written order terminating Respondent-mother's parental rights on each of the three grounds alleged by Petitioner-father, and finding termination to be in the best interest of the minor child.

Before addressing the merits of Respondent-mother's appeal, we observe that the petition to terminate rights was filed on 14 September 2005, prior to the 1 October 2005 effective date for the repeal of N.C. Gen. Stat. § 7B-1113, which required written notice of an appeal from an adjudication order to be filed within ten days of the entry of the order. N.C. Gen. Stat. § 7B-1113 (2004) (repealed by 2005 N.C. Sess. Law 398). Accordingly, Respondent-mother should have filed her notice of appeal within ten days of the entry of the trial court's order dated 9 January 2006.

However, counsel for Petitioner-father did not mail a copy of the order to Respondent-mother's counsel until 2 February 2006. Even so, more than ten days passed until Respondent-mother filed her notice of appeal on 17 February 2006. Because this timeline exceeds the statutory requirement, Respondent-mother filed a contemporaneous petition for writ of certiorari to this Court, pursuant to N.C. R. App. P. 21(a)(1). We find that "appropriate circumstances" exist to permit our review of the trial court's order terminating Respondent-mother's parental rights; accordingly, we grant her petition.

On appeal, Respondent-mother challenges each of the three

separate grounds the trial court found to exist for the termination of her parental rights. Respondent-mother contends that the trial court's conclusions were not supported by the findings of fact nor by clear and convincing evidence. After careful review of the record before us, we find that the trial court's conclusion as to Respondent-mother's failure to pay for the care, support, and education of the minor child, as required by the September 2004 consent order, was supported by the findings and by clear and convincing evidence. Because this conclusion is sufficient to affirm the termination of Respondent-mother's parental rights, we decline to examine her arguments as to the other two grounds. See *In re Pierce*, 67 N.C. App. 257, 261, 312 S.E.2d 900, 903 (1984) ("A finding of any one of the . . . separately enumerated grounds is sufficient to support a termination."); see also *In re J.A.A.*, 175 N.C. App. 66, 74, 623 S.E.2d 45, 50 (2005) ("The trial court can terminate a respondent's parental rights upon the finding of one of the grounds enumerated in N.C. Gen. Stat. § 7B-1111(a).").

North Carolina General Statute § 7B-1111(a)(4) provides that

The court may terminate the parental rights upon a finding of one or more of the following:

. . .
(4) One parent has been awarded custody of the juvenile by judicial decree or has custody by agreement of the parties, and the other parent whose parental rights are sought to be terminated has for a period of one year or more next preceding the filing of the petition or motion willfully failed without justification to pay for the care, support, or education of the juvenile, as required by said decree or custody agreement.

N.C. Gen. Stat. § 7B-1111(a)(4) (2003). When reviewing a

termination proceeding, this Court "should affirm the trial court where the court's findings of fact are based upon clear, cogent and convincing evidence and the findings support the conclusions of law." *In re Allred*, 122 N.C. App. 561, 565, 471 S.E.2d 84, 86 (1996). Moreover, findings of fact are conclusive on appeal if they are supported by "ample, competent evidence," even if there is evidence to the contrary. *In re Williamson*, 91 N.C. App. 668, 674, 373 S.E.2d 317, 320 (1988). If unchallenged on appeal, findings of fact "are deemed supported by competent evidence" and are binding upon this Court. *In re Padgett*, 156 N.C. App. 644, 648, 577 S.E.2d 337, 340 (2003). "So long as the findings of fact support a conclusion based on [the statute], the order terminating parental rights must be affirmed." *In re Oghenekevebe*, 123 N.C. App. 434, 436, 473 S.E.2d 393, 395-96 (1996).

In the instant case, Respondent-mother argues that Petitioner-father waived child support in the consent order, that he did not request reimbursement from her for expenses incurred in 2005, and that her failure to reimburse was not willful in light of her limited ability to pay support. In essence, she contends that the consent order requiring her to reimburse Petitioner-father for one-half of the minor child's uninsured medical and extracurricular expenses does not constitute "pay[ment] for the care, support, or education" of the child. We disagree.

Our courts have long recognized that "the rights of the parents are a counterpart of the responsibilities they have assumed." *Price v. Howard*, 346 N.C. 68, 76, 484 S.E.2d 527, 533

(1997) (quoting *Lehr v. Robertson*, 463 U.S. 248, 257, 77 L. Ed. 2d 614, 624 (1983)). Thus, "a parent may lose the constitutionally protected paramount right to child custody if the parent's conduct is inconsistent with this presumption or if the parent fails to shoulder the responsibilities that are attendant to rearing a child." *Cantrell v. Wishon*, 141 N.C. App. 340, 343, 540 S.E.2d 804, 806 (2000). Included in these responsibilities is the obligation to provide for the financial support of the child, with some allowances for a parent's circumstances and actual ability to pay such support. See *Bost v. Van Nortwick*, 117 N.C. App. 1, 16-17, 449 S.E.2d 911, 919-20 (1994), appeal dismissed by 340 N.C. 109, 458 S.E.2d 183 (1995).

Here, the trial court found that, although Petitioner-father had waived his claim for child support, Respondent-mother was required by the December 2004 consent order to pay one-half of the uninsured medical and extracurricular expenses of the minor child. She was ordered to reimburse Petitioner-father for such expenses within thirty days of his submission to her of receipts and a bill of the costs. Moreover, the trial court found that Respondent-mother failed to pay for any of the expenses incurred during both 2003 and 2004, and that Petitioner-father ceased sending the receipts at the end of 2004 for that reason. Thus, Respondent-mother did not pay for any expenses incurred in the first nine months of 2005, prior to the termination hearing. Respondent-mother testified that she refused to pay the expenses because she was being denied visitation with the minor child. She also stated

that she "didn't feel like [she] should have to pay these outrageous prices if [she] never got to see [her] daughter." Both Petitioner-father and his wife testified that Respondent-mother was not denied access to the minor child, but that Respondent-mother in fact made infrequent attempts to visit or contact the child.

The record shows that Petitioner-father and his wife sent Respondent-mother a list of expenses totaling \$3,519.63 for 2003 and \$2,091.00 in 2004. Respondent-mother's share of these expenses would have been \$2,805.31.00. The bulk of these expenses were related to the minor child's orthodontia and participation in a softball league. Respondent-mother testified at the termination hearing that she made roughly two hundred dollars per week cleaning houses while she was out of prison from July 2004 until August 2005, but put none of that money towards the minor child's expenses.

The clear language of N.C. Gen. Stat. § 7B-1111(a)(4) refers to a parent's "willful[] fail[ure] without justification to pay for the care, support, or education of the juvenile, as required by [judicial] decree" for a period of one year or more prior to the filing of the petition to terminate parental rights. Nowhere is that requirement mitigated by the fact that the other parent may be providing for the strict necessities - food, shelter, clothing, medical care - of the child. Rather, the statute reflects the idea that with parental rights comes the responsibility to provide financial support for a child's well-being, including for needs that may not be strictly necessary, such as orthodontia and

participation in extracurricular sports and other activities. Respondent-mother had the ability to pay some portion of the minor child's expenses yet refused to do so for over two years prior to the filing of the termination petition. Even if Petitioner-father did not submit receipts for the nine months in 2005 prior to the hearing, Respondent-mother made no effort to provide reimbursement for the expenses of which she was already aware.

Under such circumstances, we find that Respondent-mother has attempted to maintain her parental rights while refusing to acknowledge her attendant parental responsibilities. As stated by the trial court, we acknowledge that Respondent-mother "still loves the child." Nonetheless, we are constrained by the fact that the record contains clear and convincing evidence to support the trial court's findings of fact as to Respondent-mother's failure to pay support while out of prison. Furthermore, those findings support his conclusion that Respondent-mother had failed to provide support under N.C. Gen. Stat. § 7B-1111(a)(4). Accordingly, this assignment of error is overruled, and we affirm the trial court's termination of Respondent-mother's parental rights on those grounds.

Respondent-mother also argues that the trial court abused its discretion by failing to find that it was in the best interest of the minor child not to terminate Respondent-mother's parental rights. We disagree.

Upon finding the existence of one of the statutory grounds for the termination of parental rights, "the court shall issue an order

terminating the parental rights of such parent . . . unless the court shall further determine that the best interests of the juvenile require that the parental rights of the parent not be terminated." N.C. Gen. Stat. § 7B-1110 (2003) (amended by 2005 N.C. Sess. Law 398). A determination with respect to whether parental rights should be terminated is within the discretion of the trial court. *Allred*, 122 N.C. App. at 569, 471 S.E.2d at 88.

Here, testimony at the termination hearing suggested that the minor child, fifteen years old at the time of the hearing, approached Petitioner-father about initiating the proceedings, in part in the hope of being adopted by her stepmother, and that she did not wish to interact with Respondent-mother. Furthermore, Petitioner-father and his wife were shown to be providing a good, stable home for the minor child and that she is well adjusted and thriving in school. Her guardian ad litem also testified that it would be in her best interests for Respondent-mother's parental rights to be terminated.

In light of such evidence, we conclude the trial court did not abuse his discretion in determining it was in the best interest of the child to terminate Respondent-mother's parental rights. Accordingly, this assignment of error is without merit.

Affirmed.

Judges HUNTER and STEELMAN concur.

Report per Rule 30(e).